

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  U S WEST COMMUNICATIONS, INC.	DOCKET NO. INU-99-3
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**ORDER INITIATING FORMAL NOTICE AND COMMENT PROCEEDING**

(Issued July 23, 1999)

**INTRODUCTION**

On May 25, 1999, U S WEST Communications, Inc. (U S West), filed a petition for determination of effective competition, for waiver of accounting plan requirement, and for expedited consideration, pursuant to IOWA CODE § 476.1D (1999). U S West asks the Board to determine that certain portions of U S West's existing local exchange service area have become subject to effective competition and should be deregulated. U S West calls these areas "competitive zones." If the competitive zones are deregulated, U S West requests a waiver of the Board rules requiring the filing of an accounting plan, based upon the fact that U S West's rates are presently regulated pursuant to a price regulation plan under IOWA CODE § 476.97. Finally, U S West requests expedited consideration of its petition, pursuant to IOWA ADMIN. CODE 199-5.3(2) (1999).

In support of its petition, U S West states that South Slope Cooperative Telephone Company (South Slope) has applied for and received modifications of its certificate of public convenience and necessity to permit South Slope to offer

competitive telecommunications services in parts of U S West's Iowa City and Cedar Rapids exchanges. These are the areas that U S West asks the Board to deregulate as competitive zones, largely as a result of facilities-based competition from South Slope.

### **THE RESPONSIVE MOTIONS**

On June 11, 1999, South Slope filed an answer to the petition and a motion to dismiss. On June 24, 1999, AT&T Communications of the Midwest, Inc. (AT&T), and MCI WorldCom, Inc. (MCI), filed a response to U S West's petition. Finally, on June 25, 1999, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a response to the petition, a joinder in South Slope's motion to dismiss, and a request for an order directing compliance with IOWA ADMIN. CODE 199-5.2(2)"c." Each of these filings urges the Board to dismiss U S West's petition due to an alleged lack of statutory authority to deregulate on a geographic basis.

MCI and AT&T also argue that the existence of a single competitor, South Slope, is insufficient to justify deregulation of any of U S West's services; that U S West's petition does not provide prima facie evidence that the services are subject to competition; and that the petition is deficient because it does not include an identification of all actual or potential competitive providers of service.

In the alternative to its argument concerning statutory authority, Consumer Advocate asks that the Board docket this matter as a formal notice and comment

proceeding with evidentiary hearings and discovery to develop a reliable record. Consumer Advocate asserts that such a record will show that U S West does not face effective competition for telecommunications services within the proposed competitive zones. Consumer Advocate also asks the Board to direct U S West to comply with IOWA ADMIN. CODE 199-5.2(2)"c," which requires a petition for deregulation to include an identification of all actual or potential competitive providers of the service or facility in question. Finally, Consumer Advocate resists U S West's request for expedited consideration because the services in question are not newly-proposed services and because U S West has not served notice of its petition on all actual or potential competitors.

On July 1, 1999, U S West filed a combined response to the South Slope, AT&T, MCI, and Consumer Advocate motions, arguing that the Board has the statutory authority to deregulate telecommunications services on a geographically-defined basis and that the Board should exercise its authority in this docket.

## **ANALYSIS**

The Board will deny the motions to dismiss, schedule a formal notice and comment proceeding, defer ruling on the waiver request, and direct U S West to comply with the identification and notice requirements of the deregulation rules.

### **1. The Board's Authority To Deregulate**

The Board will deny the motions to dismiss based upon a preliminary determination that it has the authority to deregulate telecommunications services and

facilities on a less-than-statewide basis, in appropriate cases. However, the Board notes that in the past it has concluded that geographically-limited deregulation may be undesirable for a variety of reasons.

The deregulation statute, IOWA CODE § 476.1D(1), provides in relevant part that "the jurisdiction of the board as to the regulation of communications services is not applicable to a service or facility that is provided or is proposed to be provided by a telephone utility that is or becomes subject to effective competition, as determined by the board." For purposes of this question, the key statutory term is "service or facility." If the service or facility can reasonably be defined on a geographically-limited basis, then there is no apparent statutory reason the service cannot be deregulated on that basis.

South Slope argues that two statutes, §§ 476.29 and 476.100, are inconsistent with the idea of geographic deregulation of local exchange services. For example, South Slope argues that § 476.29, providing for local exchange service territories and certificates of public convenience and necessity, would be "effective[ly] repeal[ed]" if the Board deregulated on a geographic basis. This argument appears to prove too much. If true, then the Board could never deregulate any competitive local exchange service or facility without "repealing" § 476.29, at least to the extent of the deregulated service. South Slope's argument results in a direct conflict between § 476.1D and § 476.29, because (under South Slope's interpretation) the first statute requires the Board to deregulate competitive telecommunications

services while the second requires the Board forever to regulate local services to a limited extent (issuing certificates and ensuring all areas of the state have service).

As a general principle, the Board avoids a statutory interpretation that results in direct conflict with a different statute, especially where there is an alternative interpretation that avoids the conflict, as there is in this matter. The language of § 476.1D permits an interpretation that preserves § 476.29 (and a number of other statutes that would be in conflict under South Slope's interpretation). The relevant provision in § 476.1D states "the jurisdiction of the board as to the regulation of communications services is not applicable to a service or facility that is" subject to competition. The statute does not say the Board has **no** jurisdiction over deregulated services, only that it loses "jurisdiction ... as to the regulation of" the services. In the following sections of the same statute, regulation is divided into two classes, rate regulation and service regulation. The statute can be interpreted to mean the Board's rate and service jurisdiction is lost at the time of deregulation, but the Board retains jurisdiction over matters other than rate and service regulation. Under this interpretation, the Board can deregulate a competitive local exchange service and still issue certificates pursuant to § 476.29, still resolve interconnection disputes under § 476.11, still enforce the prohibitions of § 476.100 and the competitive market requirements of § 476.101, still collect universal service fund contributions pursuant to § 476.102, and still enforce the new anti-slamming provisions of House File 588 from the most recent legislative session, because these

specific regulatory functions are not a part of the Board's general rate and service jurisdiction.

This interpretation gives effect to all of the various statutory provisions applicable to competitive local exchange services and facilities, permitting the Board to deregulate the services (if they are found to be competitive) while at the same time preserving the Board's ability to fulfill its other duties.

Past Board decisions indicate a reluctance to deregulate on a geographically-limited basis due to accounting difficulties and administrative burdens. For example, in Investigation Into The Competitiveness Of Message Telecommunications Service, Wide Area Telecommunications Service, And Private Line Service, Docket No. INU-85-3, "Order" (issued April 11, 1986), the Board declined to deregulate long distance services at that time "because many, if not most, Iowa consumers do not have a reasonable choice among interexchange carriers." Order at p. 7. The Board stated:

We realize we cannot wait until every customer in the state has a choice among multiple providers before finding the services are subject to competition. We now hope to establish specific standards for use in determining whether long-distance services in Iowa are competitive. The Commission, at this point, believes competitiveness should be determined on a state-wide basis. The Commission had considered the feasibility of deregulating specific routes or deregulating on an exchange-by-exchange basis. For several reasons, we reject the partial deregulation alternative. It would create difficult and costly accounting problems for the utilities. It would also be difficult for the Commission to monitor the accounting and keep track of what areas have been deregulated.

Id. Similarly, in Deregulation Of InterLATA Interexchange Message Telecommunication Service (MTS), Wide Area Telecommunication Service (WATS), And Custom Network Service, Docket No. INU-88-2, "Order Granting Deregulation Petition In Part And Directing Additional Investigation Into Competitiveness Of Operator-Assisted MTS" (issued April 5, 1989), the Board decided to deregulate certain services on a state-wide basis even though competitive services were not available everywhere in the state, saying:

The Board in Docket No. INU-85-3 stated its belief that competitiveness should be determined on a statewide basis but noted that deregulation could not wait until every customer in the state had a choice among multiple providers. Id. 7. The Board will continue to be guided by those two principles. Retaining regulation of AT&T's service for certain local exchanges while deregulating them elsewhere is impractical. It would create serious administrative difficulties for AT&T and place significant burdens on the Board. Regarding the second principle, the Board believes it would be unreasonable to permit AT&T's competitors to prevent deregulation by merely declining to provide service in certain areas of the state.

Order at p. 4.

The Board's decisions in these two cases reflect the administrative difficulty of separating regulated and deregulated services and facilities on a geographic basis. This separation was required under traditional rate regulation. Under price regulation, it may no longer be a significant concern. Deregulation on a less-than-statewide basis deserves a fresh look. Accordingly, the motions to dismiss are denied.

## **2. Initiation of formal proceeding**

Pursuant to IOWA ADMIN. CODE 199-5.3(1), the Board will initiate a formal notice and comment proceeding, identified as Docket No. INU-99-3, to determine whether all telecommunications services offered within the alleged competitive zones are subject to effective competition and should be deregulated. U S West's petition identifies at least one alleged competitor in the alleged competitive zones. The petition provides indications the criteria for effective competition in IOWA ADMIN. CODE 199-5.6(1) may be met, including availability of comparable services from a choice of suppliers, inability of a single provider to determine or control prices, ease and likelihood of entry, and substitutability of one provider's service for another.

The Board intends to develop a complete evidentiary record concerning the application of the criteria in subrule 5.6(1) to the identified services. Participants in this docket will be permitted to file sworn statements of position and counterstatements, pursuant to IOWA ADMIN. CODE 199-5.4. An oral presentation, at which all participants will be permitted to cross-examine other participants, will be held pursuant to rules 5.3(4) and 5.5.

In order to ensure an adequate record is made in this proceeding, the Board will ask all participants to, at a minimum, respond to the following questions:

1. What should constitute a "competitive zone?"



2. What (if any) specific criteria, beyond those listed in IOWA ADMIN. CODE 199-5.6(1), should be used to determine whether a geographic area is subject to effective competition?

3. What (if any) communications services or facilities should the Board deem to be essential under IOWA CODE § 476.1D(5) and IOWA ADMIN. CODE 199-5.6(2)? What additional criteria beyond those listed in IOWA ADMIN. CODE 199-5.6(2), if any, should the Board consider when determining whether a service or facility is essential?

4. What essential communications services or facilities warrant retention of service regulation, even if the Board concludes the rates should be deregulated?

5. What revisions to IOWA ADMIN. CODE 199-5 are necessary or appropriate to accommodate deregulation on a less-than-statewide basis?

While the Board asks all participants to respond to each of these questions, the Board is not limiting statements to these issues. Each participant is free to include in its statement any information the participant believes to be relevant to the matter before the Board.

**3. Compliance With IOWA ADMIN. CODE 199-5.2(2)"c"**

Consumer Advocate asks the Board to direct U S West to comply with IOWA ADMIN. CODE 199-5.2(2)"c," which requires a petition for deregulation to include an identification of all actual or potential competitive providers of the service or facility in

question. According to Consumer Advocate, U S West's petition alleges potential competition from several classes of providers, but identifies only two potential competitors by name, only one of which was served with the petition. Consumer Advocate asks the Board to direct U S West to make a good faith effort to prepare and file a list of all persons or parties whose existence U S West asserts as justification for deregulation of U S West services or facilities.

U S West's response does not address this matter.

It is reasonable to require that U S West comply with IOWA ADMIN. CODE 199-5.2(2)"c," which requires that a petition for deregulation include "an identification of all persons or parties who are actual or potential competitive providers of the service or facility." The rule requires something more than the generic list of possible types of competitors provided by U S West. If U S West wants the Board to consider other facilities-based providers, resellers, municipalities, and independent local exchange companies as potential competitors in the geographic zones U S West is seeking to have deregulated, then U S West must specifically identify each of the alleged competitors in a list to be filed with the Board and served upon each alleged competitor.

#### **4. U S West's Request For Expedited Consideration**

Finally, U S West requests expedited consideration of its petition, pursuant to IOWA ADMIN. CODE 199-5.2(3) (1999). Consumer Advocate resists U S West's request for expedited consideration because the services in question are not newly-

proposed services and because U S West has not served notice of its petition on all actual or potential competitors.

The Board will deny the request for expedited consideration. Expedited procedures are only available under IOWA ADMIN. CODE 199-5.2(3) for a petition "which relates to a proposed service or facility not yet offered by the utility and not an existing service or facility...." Moreover, before expedited consideration is available, the rule requires that notice be given "to all persons reasonably identified as actual or potential competitive providers of the service or facility and to all local and interexchange telephone utilities in Iowa." Id. U S West's petition requests deregulation of existing services and facilities and U S West did not serve the petition on all required persons. Each of these facts makes the rule inapplicable to U S West's petition.

#### **5. U S West's Request For Waiver Of Accounting Plan**

U S West also requests "a waiver of the requirement to file an accounting plan," presumably a reference to IOWA ADMIN. CODE 199-5.7(b) and (c). The Board will defer ruling on U S West's waiver request until it determines whether any services or facilities will be deregulated as a result of this docket.

#### **6. Notice**

The Board's rules require that upon docketing a petition for deregulation of a telecommunications service or facility, the Board will cause notice of the proceeding to be published in the Iowa Administrative Bulletin and the Board may require

specific notice to persons identified as competitors. IOWA ADMIN. CODE 199-5.3(3). The Board will require U S West to serve a copy of its petition and this order on each person identified by U S West as an actual or potential competitor in the list it will be preparing and filing with the Board.

### **ORDERING CLAUSES**

#### **IT IS THEREFORE ORDERED:**

1. A formal notice and comment proceeding, identified as Docket No. INU-99-3, is initiated to determine whether the telecommunications services offered within the alleged "competitive zones" identified in U S West's petition are subject to effective competition and should be deregulated pursuant to IOWA CODE § 476.1D.
2. The Executive Secretary of the Board is directed to cause notice of the docketing of these proceedings to be published in the Iowa Administrative Bulletin. In addition, a copy of this order shall be mailed to each telecommunications carrier with a tariff on file with the Board.
3. U S West is directed to prepare a list identifying all actual or potential competitive providers of the service or facility that U S West is asking the Board to deregulate. The list is to be filed with the Board on or before July 30, 1999. U S West shall then serve upon each person or entity named on the list, and upon Consumer Advocate, a copy of the petition filed in this docket on May 25, 1999, this order, and the list prepared by U S West, on or before August 6, 1999.

4. The following procedural schedule is established:
  - a. Any interested person may file, on or before September 10, 1999, a statement of position concerning deregulation of the listed services. Statements of position must substantially comply with IOWA ADMIN. CODE 199-2.2(2). Ten copies must be filed with the original.
  - b. Any person filing a statement of position may file a counterstatement replying to the comments of other participants no later than September 28, 1999. Ten copies must be filed with the original and copies must be served upon all participants filing statements to which the counterstatement responds. Counterstatements must substantially comply with IOWA ADMIN. CODE 199-2.2(3).
  - c. All statements and counterstatements shall be sworn and directed to the Executive Secretary, Iowa Utilities Board, 350 Maple Street, Des Moines, Iowa 50319-0069.
  - d. An oral presentation is scheduled for the purpose of taking sworn testimony concerning the statements and counterstatements. The oral presentation shall be held October 12, 1999, beginning at 10:00 a.m. in the Board's hearing room at 350 Maple Street, Des Moines, Iowa. All persons filing written statements shall have at least one witness available at the oral presentation who may be cross-examined on the subject matter of the written statement. Cross-examination may be by the Board, the Consumer Advocate,

and other participants as the Board may deem appropriate to develop the record fully. Persons with disabilities requiring assistive services or devices to observe or participate should contact the Board at 515-281-5256 in advance of the scheduled date to request that appropriate arrangements be made.

**UTILITIES BOARD**

/s/ Allan T. Thoms

/s/ Susan J. Frye

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary, Deputy

/s/ Diane Munns

Dated at Des Moines, Iowa, this 23<sup>rd</sup> day of July, 1999.

## **UTILITIES DIVISION [199]**

### **NOTICE OF INTENDED ACTION**

The Utilities Board (Board) hereby gives notice that on July 15, 1999, the Board issued an order in Docket No. INU-99-3, In Re: U S WEST Communications, Inc., "Order Initiating Formal Notice And Comment Proceeding," pursuant to Iowa Code section 476.1D, to consider whether local exchange telecommunications services should be deregulated in certain areas where two facilities-based providers are alleged to be competing.

On May 25, 1999, U S WEST Communications, Inc. (U S West), filed a petition asking the Board to determine that certain portions of U S West's existing local exchange service area have become subject to effective competition and should be deregulated. U S West calls these areas "competitive zones." Pursuant to IOWA ADMIN. CODE 199-5.3(1), the Board is initiating a formal notice and comment proceeding to determine whether all telecommunications services offered within the alleged competitive zones are subject to effective competition and should be deregulated. U S West's petition provides indications the criteria for effective competition in IOWA ADMIN. CODE 199-5.6(1) may be met, including availability of comparable services from a choice of suppliers, inability of a single provider to determine or control prices, ease and likelihood of entry, and substitutability of one provider's service for another. The petition makes a sufficient initial showing of competition to justify these proceedings.

In order to ensure an adequate record is made in this proceeding, the Board asks all participants to, at a minimum, respond to the following questions:

1. What should constitute a "competitive zone?"
2. What (if any) specific criteria, beyond those listed in 199 IAC 5.6(1), should be used to determine whether a geographic area is subject to effective competition?
3. What (if any) communications services or facilities should the Board deem to be essential under Iowa Code section 476.1D(5) and 199 IAC 5.6(2)? What additional criteria beyond those listed in 199 IAC 5.6(2), if any, should the Board consider when determining whether a service or facility is essential?
4. What essential communications services or facilities warrant retention of service regulation, even if the Board concludes the rates should be deregulated?
5. What revisions to 199 IAC 5 are necessary or appropriate to accommodate deregulation on a less-than-statewide basis?

While the Board asks all participants to respond to each of these questions, the Board is not limiting statements to these issues. Each participant is free to include in its statement any information the participant believes to be relevant to the matter before the Board.

Copies of the Board's complete order initiating formal notice and comment proceedings may be obtained from the Board by calling 515-281-6240 or off the Board's web page, <http://www.state.ia.us/iub>.

Any interested person may file, on or before September 10, 1999, a statement of position concerning deregulation of the listed services. Statements of position must



substantially comply with 199 IAC 2.2(2). Ten copies must be filed with the original. All written statements should clearly state the author's name and address and should make specific reference to Docket No. INU-99-3.

Any person filing a statement of position may file a counterstatement replying to the comments of other participants no later than September 28, 1999. Ten copies must be filed with the original and copies must be served upon all participants filing statements to which the counterstatement responds. Counterstatements must substantially comply with 199 IAC 2.2(3).

All statements and counterstatements shall be sworn and directed to the Executive Secretary, Iowa Utilities Board, 350 Maple Street, Des Moines, Iowa 50319-0069.

An oral presentation is scheduled, pursuant to 199 IAC 5.3(4) and 5.5, for the purpose of taking sworn testimony concerning the statements and counterstatements. The oral presentation shall be held October 12, 1999, beginning at 10 a.m. in the Board's hearing room at 350 Maple Street, Des Moines, Iowa. All persons filing written statements shall have at least one witness available at the oral presentation who may be cross-examined on the subject matter of the written statement. Cross-examination may be by the Board, the Consumer Advocate Division of the Department of Justice, and other participants as the Board may deem appropriate to develop the record fully. Persons with disabilities requiring assistive services or devices to observe or participate should contact the Board at

515-281-5256 in advance of the scheduled date to request that appropriate arrangements be made.

July 23 , 1999

/s/ Allan T. Thoms  
Allan T. Thoms  
Chairperson